

No. 19-1177

IN THE
Supreme Court of the United States

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC.,
SIM-TEX, LP, AND KURT ORBAN PARTNERS, LLC,

Petitioners,

v.

UNITED STATES AND MARK A. MARGAN,
COMMISSIONER, UNITED STATES CUSTOMS AND
BORDER PROTECTION,

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit**

**BRIEF OF AMICUS CURIAE BASRAI FARMS IN
SUPPORT OF PETITIONERS**

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INTEREST OF AMICUS CURIAE¹

The American Institute for International Steel, Inc., Sim-Tex LP and Kurt Orban Partners, LLC (the “Petitioners”) seek a writ of certiorari to review the Federal Circuit’s judgment rejecting a facial challenge to Section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862 (2018) (“Section 232”), as an over-delegation of legislative power reserved to Congress. *Am. Inst. for Int’l Steel, Inc. v. United States*, No. 2019-1727, 2020 U.S. App. LEXIS 6106 (Fed. Cir. Mar. 25, 2019), *petition for cert. filed*, 2020 U.S. S. CT. BRIEFS LEXIS 1191 (U.S. Mar. 25, 2020) (No. 19-1177) (“Pet. for Cert.”).

Basrai Farms, located in Yuba City, California, grows both walnuts and prunes. In 1959, Sawarn Singh Basrai established Basrai Farms when he immigrated from India to join his younger brother Parmjit in Yuba City. The brothers realized the dream of their father, Aujagar, of establishing a family farm in the United States. Today, Basrai Farms grows over 175 acres of walnuts and prunes. Californian walnut farmers produce approximately 99 percent of the total domestic production of walnuts and approximately two-thirds of the world walnut

¹ As required by Supreme Court Rule 37.2, timely notice of intent was given. This brief is accompanied by the written consent of all parties. Counsel for the Petitioners lodged a blanket consent letter with the Court and counsel for the Respondents have consented via electronic mail. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

trade. *See California Walnut Industry Expects 10 Percent Bump in Crop Yield Over 2017*, THE PRODUCER NEWS, <http://www.producenews.com/markets-and-trends/24924-california-walnut-industry-expects-10-percent-bump-in-crop-yield-over-2017> (last visited Apr. 20, 2020).

Basrai Farms has a substantial interest in the petition for certiorari because, in response to the President’s decision to impose tariffs on steel and aluminum imports under Section 232, foreign countries implemented retaliatory tariffs directly targeting U.S. farms, factories and other enterprises. These measures extended the impact of the President’s actions far beyond the steel and aluminum industries, sweeping up entities like Basrai Farms. Section 232, however, does not establish how the President should weigh the adverse consequences of retaliatory tariffs. *See* Pet. for Cert. at 7-8. Basrai Farms submits this amicus brief to provide the Court with context surrounding the effects of such retaliatory tariffs on the U.S. agricultural industry.

INTRODUCTION AND SUMMARY OF ARGUMENT

The very foundation of our government, the principle of separation of powers, is at stake in this case. The Constitution specifies that “{a}ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” U.S. Const. art. I, § 1. Among the powers granted to Congress are the

authority to “to lay and collect taxes, duties, imposts and excises.” *Id.* at § 8. Article I, Section Eight emerged from our country’s revolution from British rule, which began with the colonists resisting the imposition of tariffs and taxes that had been enacted by legislative bodies for which the colonists could not vote.² In short, this case harkens back to an issue at the heart of our country’s foundation – unlawful taxation – and confirms why this Court must reaffirm the necessary separation of powers intended by the Founding Fathers.

² The colonists understood that the connection between taxation and suffrage reflected a century of bloody struggle across England, Ireland, Scotland, and Wales. First, with a tariff increase without Parliamentary assent by James I of England in 1604. *See Proposed constitutional amendments to Balance the Federal Budget: Hearing Before the Committee on the Budget*, 103rd Cong. 1336 (1994) (“Constitutional Amendments”). Then taxes without Parliament by James I in 1619, and by his son, Charles II in 1628, 1634, and 1635. *See generally* Michael Mendle, *The Ship Money Case, The Case of Shipmoney, and the Development of Henry Parker’s Parliamentary Absolutism*, 32 *THE HIST. J.* 513 (1989). This led eventually to the Petition of Right, drafted mainly by Sir Edward Coke, in 1628; the escape of Sir John Hampden and five other members out the back door of Parliament; a bloody civil war from 1642-50 and the decapitation of Charles I in 1649; and the overthrow of James II in 1689 by William and Mary only after they agreed to the 1689 Bill of Rights. This Bill of Rights established “that levying money for or to use of the crown by pretense or prerogative, without grant of Parliament for longer time or in other manner than the same is or shall be granted, is illegal.” *Constitutional Amendments* at 1347. That Bill of Rights was not ancient history to the Founding Fathers and much of it was carried over into our 1776 Declaration of Independence and then our Constitution, notably Article I, Section 8.

The lower court, the Court of International Trade (“CIT”), denied Petitioners’ motion for summary judgment seeking a declaration that Section 232 constitutes an impermissible delegation of legislative authority to the President. *Am. Inst. for Int’l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335 (Ct. Int’l Trade 2019) (“*AIIS*”). Although the lower court found itself bound by this Court’s decision in *Federal Energy Administration v. Algonquin SNG Inc.*, 426 U.S. 548, 558-60 (1976) (“*Algonquin*”), it noted that Section 232 “seem{ed} to invite the President to regulate commerce by means reserved for Congress, leaving very few tools beyond his reach.” *AIIS*, 376 F. Supp. 3d at 1344-45. The Federal Circuit affirmed the lower court’s ruling, finding itself similarly bound by *Algonquin*. See *Am. Inst. for Int’l Steel, Inc. v. United States*, No. 2019-1727, 2020 U.S. App. LEXIS 6106, at *16 (Fed. Cir. Feb. 28, 2020) (“*AIIS II*”).

Retaliatory tariffs imposed by other countries in response to the President’s implementation of Section 232 tariffs were specifically designed to target the agricultural industry, including walnut famers like Basrai Farms. The significant impact on the agricultural industry extends the effects of the Section 232 tariffs to virtually the entire American economy. Section 232 provides no guidance on how the President is to weigh these adverse financial consequences against any potential benefit to the steel and aluminum industries.

The gravity of the harm caused to the agricultural industry, and the fact that such harm is likely to continue, demonstrate why this Court should grant Petitioners’ request for certiorari to address the

significant over-delegation concerns presented by Section 232. As Judge Katzmann details in his CIT dubitante opinion, “if the delegation permitted by section 232 . . . does not constitute excessive delegation in violation of the Constitution, what would?” *AHS*, 376 F. Supp. 3d at 1352 (Katzmann, J., dubitante). This Court should decide this issue before further delay cripples our country’s agricultural industry beyond repair.

ARGUMENT

Basrai Farms is one of many farms suffering immense harm from the effects of the President’s decision to implement tariffs on imports of steel and aluminum under Section 232. For example, retaliatory tariffs have forced Lorenda Overman, a corn and soybean farmer from North Carolina, to sell her crops below cost and she has been unable to pay her workers. *See* Humeryra Pamuk, “*We Need it Now*”: *U.S. Farm Country Pins Hopes on China Trade Deal*, REUTERS (Mar. 6, 2019, 7:12 AM), <https://www.reuters.com/article/us-usa-trade-farmers/we-need-it-now-us-farm-country-pins-hopes-on-china-trade-deal-idUSKCN1QN1F7> (“*We Need it Now*”). This is just one of many examples of an entire agricultural industry suffering from the effects of retaliatory tariffs.

This Court should grant certiorari to address the underlying question on the merits: whether Section 232 represents an unconstitutional delegation of legislative authority to the President. The imposition of retaliatory measures, for which the statute provides no guidance for how the President is

to weigh these consequences, further illustrates the unconstitutional breadth of authority delegated to the President by extending the impact of Section 232 tariffs to the entire U.S. economy. An examination of the effects of retaliatory tariffs on U.S. agriculture not only demonstrates the reality of Petitioners' strong improper delegation claim, but also provides further reason for this Court to grant certiorari to address the irreparable harm suffered by U.S. farmers.

I. The U.S. Agricultural Industry, Including Basrai Farms, Has Been Greatly Impacted by Retaliatory Tariffs

The agricultural industry is essential to the U.S. economy, as exports of U.S. agricultural products make up between eight and nine percent of total U.S. exports. *See Anita Regmi et al., CONG. RESEARCH SERV., R46242, Major Agricultural Trade Issues in 2020* 1 (2020), *available at* https://www.everycrsreport.com/files/20200227_R46242_75a1814cb3e5349bdd0c32ca2e3d963e4a045e82.pdf (“CRS 2020 Ag. Issues”). The U.S. Department of Agriculture (“USDA”) Economic Research Service estimated that in 2017 “each dollar of U.S. agricultural exports stimulated an additional \$1.30 in business activity” and “U.S. agricultural exports generated an estimated 1,161,000 full-time civilian jobs.” *Anita Regmi et al., Cong. Research Serv., R45728, Major Agricultural Trade Issues in the 116th Congress* 2 (2019), *available at* <https://crsreports.congress.gov/product/pdf/R/R45728>. The grave impact of the retaliatory tariffs on the agricultural industry illustrates how the President’s decision to apply Section 232 tariffs extends beyond

the steel and aluminum industries, covering the entire U.S. economy.

A. The U.S. Agricultural Industry Depends on Exports

The President's imposition of Section 232 tariffs has led to massive retaliatory actions by other nations against U.S. exports. These retaliatory actions have had a significant impact on industries that depend on exports, including the U.S. agricultural industry, which exports one-fifth of its total production. *See* CRS 2020 Ag. Issues at 1.

Overall, the United States exports more agricultural products than it imports. *See* Hope Kirwan, *Trump Administration's Trade Policy Could Be A Factor In Wisconsin's US Senate Race*, WISCONSIN PUBLIC RADIO (Sept. 11, 2018, 6:10 AM), <https://www.wpr.org/wisconsin-farmers-feel-impact-tariffs-worry-about-future-trade>. In selecting retaliatory measures, foreign countries specifically targeted agricultural commodities because they are heavily dependent on exports. *See* Tara Golshan, *Trump: "Tariffs are the Greatest." Also Farmers Need \$12 Billion in Aid Because of Tariffs.*, VOX (July 24, 2018, 1:00 PM EDT), <https://www.vox.com/2018/7/24/17607484/trump-tariff-farmers-emergency-aid>. For example, "commodities for which US. exports to the retaliating countries represent 30% or more of its total exports include soybeans, sorghum, pork, cheese, apples, cherries, seafood, ginseng, whiskey, and some processed foods." Jenny Hopkinson, CONG. RESEARCH SERV., R45448, Profiles and Effects of Retaliatory Tariffs on U.S. Agricultural Exports at Summary,

available at
<https://crsreports.congress.gov/product/pdf/R/R45448>
(updated December 31, 2018) (“CRS Retaliatory Tariffs”). The U.S. food and beverage industry is the second-largest group affected by retaliatory tariffs. See Brock R. Williams et al., CONG. RESEARCH SERV., R45529, Trump Administration Tariff Actions (Sections 201, 232, and 301): Frequently Asked Questions 15-16, Figure 7 (2019), *available at* <https://crsreports.congress.gov/product/pdf/R/R45529>.

B. Retaliatory Tariffs Target Both a Significant Proportion and a Wide Array of Agricultural Products

Foreign countries maximized the harm caused by retaliatory duties by targeting a significant portion of agricultural exports both in terms of the total percentage of exports impacted and the number of commodities targeted.

Canada, China, the EU, India, Mexico, Turkey and Russia have all implemented retaliatory tariffs against the United States in response to Section 232 tariffs. See Rachel F. Fefer et al, CONG. RESEARCH SERV., R45249, Section 232 Investigations: Overview and Issues for Congress 35, Figure 8, *available at* <https://fas.org/sgp/crs/misc/R45249.pdf> (updated Apr. 7, 2020) (“CRS Overview for Congress”). At the peak of their impact, using 2017 as estimate, the commodities subject to retaliation had an export value of \$26.9 billion, constituting 18 percent of all U.S. agricultural exports. CRS Retaliatory Tariffs at 1. The overall impact of retaliatory tariffs is still unknown as measures from China, the EU, India and

Russia remain in effect, impacting \$9 billion of U.S. annual exports. *See* CRS Overview for Congress at 34-35 (using 2018 export value as a base).³ The EU has announced that it plans to expand its retaliatory tariffs in response to the President’s recent implementation of additional tariffs on derivative products. *Id.* at 35.

Countries imposing retaliatory tariffs are major export markets for U.S. agriculture, further exacerbating the harm of these tariffs on the U.S. agricultural industry. In terms of value, Mexico, Canada, China and the EU are in the top five export markets for U.S. agricultural products. *See* CRS Retaliatory Tariffs at 1. Between 2014 and 2016, China alone “accounted for more than 16 percent of U.S. agricultural exports.” *Perspectives on U.S. Agricultural Trade: Hearing Before the S. Comm. on Agric.*, 115th Cong. 1 (Sept. 13, 2018) (statement of

³ In 2019, the United States removed Section 232 tariffs on Canada and Mexico in return for removal of retaliatory measures. *See The United States Announces Deal with Canada and Mexico to Lift Retaliatory Tariffs*, USTR POLICY (May 17, 2019), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/may/united-states-announces-deal-canada-and>. Although China has announced that it will reduce its tariffs on U.S. goods, these measures merely halve existing tariff rates. *See* Carlos Tejada, *China Cuts Tariffs on \$75 Billion in U.S. Goods. That Was the Easy Part.*, N.Y. TIMES (Feb. 6, 2020), <https://www.nytimes.com/2020/02/06/business/china-trade-tariffs-coronavirus.html>. Those industries such as pork and soy that will be subject to new exemptions have already suffered irreparable harm for the time tariffs were in place. *See* Zoey Zhang, *China’s Tariff Exemptions for US Imports: New Lists Announced in February*, CHINA BRIEFING (Feb. 27, 2020), <https://www.china-briefing.com/news/chinas-tariff-exemptions-us-imports-new-lists-announced-february/>.

the American Farm Bureau Federation), <https://www.fb.org/files/Trade-AFBBF-Statement-9-12-18.pdf>. The list of retaliatory tariffs is significant enough that the U.S. Department of Commerce has set up its own website to track various measures. *See Current Retaliatory Actions*, U.S. DEP'T OF COMMERCE, https://www.trade.gov/mas/ian/tradedisputes-enforcement/retaliations/tg_ian_002094.asp (last visited Apr. 17, 2020).

Besides having an impact on a significant percentage of total exports, retaliatory tariffs also cover a wide breadth of agricultural commodities, affecting “more than 800 U.S. agricultural and food products, including meats, grains, dairy products, specialty and horticultural crops, seafood, and alcohol.” CRS Retaliatory Tariffs at 3. The EU and Turkey each placed retaliatory tariffs on approximately 40 individual agricultural tariff subheadings. *See id.* at 3, table I. By September 2019, Chinese retaliatory tariffs impacted 1,053 tariff lines. *See* Anita Regmi, CONG. RESEARCH SERV., China’s Retaliatory Tariffs on U.S. Agriculture: In Brief 4 (2019), *available at* <https://crsreports.congress.gov/product/pdf/R/R45929> (“CRS China’s Tariffs”).

C. Retaliatory Tariffs Have Significantly Decreased the Quantity and Price of U.S. Agricultural Exports

Both the quantity and prices of U.S. agricultural exports have substantially decreased as a direct result of retaliatory measures in response to

the President's imposition of Section 232 tariffs. Certain states have been hit especially hard as retaliatory tariffs targeted those states whose economies depend on agriculture.

Overall, "U.S. agricultural exports subject to retaliation {were} down 27% in 2018, compared to 2017." CONG. RESEARCH SERV., INSIGHT, Escalating U.S. Tariffs: Affected Trade 3 (2020), *available at* https://www.everycrsreport.com/files/20190912_IN10971_e4e576cf2ddc04bef61eb2f2dc2bafa6cef228e2.pdf. Further, U.S. agricultural exports declined by \$8 billion between FY2018 and FY2019. *See* CRS 2020 Ag. Issues at 1; *see also* CRS Overview for Congress at 41 (finding that for the six quarters since 2017 during which retaliatory tariffs have been in place, products subject to retaliatory tariffs have decreased by 25% or more in each quarter). The value of U.S. agricultural exports to China alone decreased from \$19.5 billion in 2017 to \$9.2 billion in 2018. *See* CRS 2020 Ag. Issues at 5.

Increasing input and farm machinery costs have further aggravated the bottom line of U.S. farmers facing declining prices and exports sales. *See* Anita Regmi, Cong. Research Serv., R45903, Retaliatory Tariffs and U.S. Agriculture 38 (2019), *available at* <https://fas.org/sgp/crs/misc/R45903.pdf> (updated Sept. 13, 2019) ("CRS Retaliatory Tariffs 2"). Farmers have been unable to pass along these costs to consumers and have primarily shouldered the burden themselves. *See* Will Sawyer et al., *Foreign Tariffs Are Falling On U.S. Farmer, Not Importer*, COBANK 8 (Aug. 2019), <https://www.cobank.com/-/media/files/ked/general/foreign-tariffs-are-falling-on-us-farmer->

aug2019.pdf?la=en&hash=48353B5C28A7EB6C35D665CB26F07B4D7C4F79C0 (“CoBank Study”) (finding that 9 of 11 U.S. agricultural commodities face pressure to absorb the costs of retaliatory tariffs).

The negative impact of retaliatory tariffs has been particularly hard for U.S. pork, sorghum, soybean and dairy producers. For example:

- Retaliatory tariffs have cost U.S. pork farmers “\$1 billion in total losses.” CRS Retaliatory Tariffs 2 at 38.
- Between July and October 2018, U.S. cheese exports to China decreased by 51 percent in value as compared to the same period in 2017. Daren Bakst et al., *How the U.S.-China Trade Dispute Affects U.S. Agriculture: What you Should Know*, THE HERITAGE FOUNDATION 6 (Feb. 28, 2019), <https://www.heritage.org/sites/default/files/2019-02/BG3391.pdf>.
- The value of U.S. exports of sorghum to China declined by about 40 percent between 2017 and 2018. See CRS 2020 Ag. Issues at 5.
- The value of U.S. exports of soybeans to China declined by \$8 billion between 2017 and 2018. *Id.*
- In 2018, retaliatory tariffs cost dairy farmers more than \$1 billion in lost income. Hope Kirwan, *Dairy Organizations Ask For More Aid From USDA As Retaliatory Tariffs Impact Profits*, WISCONSIN PUBLIC RADIO (Oct. 26, 2018, 2:50 PM), <https://www.wpr.org/dairy-organizations-ask-more-aid-usda-retaliatory-tariffs-impact-profits>.

Although countries have begun lifting some retaliatory tariffs, the decrease in U.S. agricultural exports has had a permanent effect on existing supply chains. *See* CRS China's Tariffs at 8 (“Shift in trade patterns can become permanent if trade disruptions lead to new trade alliances or stimulate production in retaliating domestic markets or other competing foreign regions, thus increasing supplies from new sources.”). Many foreign countries have replaced U.S. exports with the same commodities produced in other countries. *See id.* at 7 (noting that Brazil, Australia, Canada, New Zealand, Thailand and Indonesia have increased their agricultural exports to China); *see also* CoBank Study at 3. For example, although the United States is a large soybean exporter, China can easily turn to other export sources such as Brazil, Argentina and Paraguay. *See* CRS Retaliatory Tariffs at 4. As one “third-generation corn, soybean and hog framer from Le Mars, Iowa” explained, “it’s going to be a long time before we gain some of those markets back.” *We Need it Now, supra.*

As a result, U.S. products that were previously exported are now flooding domestic markets. For instance, Michigan-grown apples that were previously intended for export have been rapidly entering the market and depressing prices. *See* Chris Alpers et al., *Opinion: Tariffs Threaten Michigan Apple Growers*, DETROIT NEWS (Mar. 25, 2019, 11:00 PM ET), <https://www.detroitnews.com/story/opinion/2019/03/26/opinion-tariffs-threaten-michigan-apple-growers/3266791002/>.

Retaliatory tariffs have been especially damaging to states whose economies depend upon

agriculture. Retaliatory tariffs decreased Nebraskan farm revenue by approximately \$700 million dollars in 2018. *A Path Forward on Trade: Retaliatory Tariffs and Nebraska Agriculture* NEBRASKA FARM BUREAU Table 2, <https://nefb.org/images/FEDeration/PDFs/A-Path-Forward-On-Trade.pdf> (last visited Apr. 20, 2020). Prices for Nebraskan agricultural products decreased between 4-6 percent for corn, 10-16.25 percent for soy and 11.5-12 percent per hog in 2018. *Id.* at 2. Meanwhile, Iowa's loss from retaliatory tariffs measured between \$1 to \$2 billion as of late 2018. Edward J. Balistreri et al., *The Impact of the 2018 Trade Disruptions on the Iowa Economy*, CENTER FOR AGRICULTURAL AND RURAL DEVELOPMENT IOWA STATE UNIVERSITY 18-PB 25 (Sept. 2018), *available at* <https://www.card.iastate.edu/products/publications/pdf/18pb25.pdf>.

D. The Nut Industry, Including Walnuts, Has Suffered from Decreased Exports and Lower Prices Caused by Retaliatory Tariffs

Like most other agricultural industries, retaliatory tariffs have had a direct impact on the U.S. nut industry. China accounts for approximately 12 percent of U.S. almond exports, and following the imposition of retaliatory tariffs, export shipments of U.S. almonds fell by nearly half in 2018. Allysia Finley, *California Farmers Are Trade-War Casualties*, WALL ST. J. (Sept. 19, 2018, 6:56 PM ET), <https://www.wsj.com/articles/california-farmers-are-trade-war-casualties-1537397773>. Similarly, China accounts for 40 percent of U.S. pistachio exports. *Id.*

Pistachio growers have suffered \$380 million in losses from retaliatory tariffs. Tariffs Hurt the Heartland, <https://tariffshurt.com/> (last visited Apr. 16, 2020).

Retaliatory tariffs have devastated the walnut industry as U.S. producers depend on exports. Californian walnut producers exported an estimated 63 percent of their shipments during the 2017-2018 season. See *California Walnuts Receive Trade Funding for Tariff Relief*, AG NET WEST (Mar. 11, 2019), <http://agnetwest.com/california-walnuts-receive-trade-funding-tariff-relief>. The walnut sector alone is facing retaliatory tariffs from China, India and Turkey. See Christine Souza, *Retaliatory Tariffs Affect Walnut Markets*, AGALERT (Nov. 7, 2018), <http://www.agalert.com/story/?id=12281>. In particular, the U.S. walnut industry has been hit especially hard by Turkey's retaliatory tariffs. Turkey is a major market for U.S. walnut producers. In 2017, it imported 23 percent of the total U.S. unshelled walnut exports. CRS Retaliatory Tariffs at 11, Table 6. USDA projected that U.S. agricultural exports to Turkey will decline approximately \$200 million in FY2019. *Id.* Like much of the agricultural industry, it will take U.S. walnut farmers years to reclaim these lost markets. Trees take many years to become productive and nut output cannot be easily adjusted to rapidly changing demand. Meanwhile, with nowhere to go, walnuts have flooded the domestic market, depressing prices further. Altogether, retaliatory tariffs will result in an estimated \$600 million net loss for the walnut industry. See Souza, *supra*.

E. The Decrease in Total Exports and Prices Has Irreparably Harmed the Agricultural Industry Including Basrai Farms

The decrease in U.S. agricultural exports stemming from the retaliatory tariffs has caused irreparable harm to an already fragile agricultural industry. It is an interconnected downward spiral with lower net farm income leading to increased bankruptcies, which in turn leads to higher rates of unemployment and reported mental health problems among farmers.

In 2018, USDA estimated that net farm income decreased by 13 percent. See Ryan McCrimmon, *Trump Tariffs Lead to Bleak 2019 Forecasts*, POLITICO (Oct. 23, 2018, 5:10 AM EDT), <https://www.politico.com/story/2018/10/23/trump-tariffs-farmers-agriculture-866450>. And but for unprecedented levels of financial aid to farmers there also would have been no growth in real farm income between 2018 and 2019. See Mezie Chinn and Bill Plumley, *What is the Total of Trade Wars on U.S. Agriculture?*, ECONOFACT (Jan. 15, 2020), <https://econofact.org/what-is-the-toll-of-trade-wars-on-u-s-agriculture> (estimating that 40 percent of farm income in 2019 came from federal aid).

As farmers live on incredibly thin margins, this decrease in real farm income has inversely correlated with a 13 percent increase in farm bankruptcies since 2018. See Andrew Whalen, *Farmers Union Vice President Says Farmers Have 'Pretty Much Lost All Our Markets Since Trump Took Over*, NEWSWEEK (Sept. 3, 2019, 2:11 PM EDT),

<https://www.newsweek.com/china-trade-war-trump-farmers-tariffs-bailout-subsidies-1457474>. And farm loan delinquencies have reached a “near nine-year high.” Jeff Daniels, *Farmer Sentiment Takes Hit Amid Growing Worries Over Trade War*, CNBC (Mar. 5, 2019, 6:53 PM ET), <https://www.cnbc.com/2019/03/05/farmer-sentiment-takes-hit-amid-worries-over-trade-war-says-survey.html>. These defaults are particularly devastating to farmers who often rely on loans to cover operating costs prior to planting season. See Alexia F. Campbell, *Farmers Are Losing Patience With Trump’s Trade War*, VOX (May 17, 2019 7:30 AM EDT), <https://www.vox.com/policy-and-politics/2019/5/17/18626664/farmers-trump-trade-war-china>.

Further, unemployment has rapidly increased in the agricultural sector. Purdue University found that the decrease in agricultural exports could “result in the reallocation of 45,000 farm, ranch, and processing workers.” CRS Retaliatory Tariffs at 4. Increases in unemployment have caused higher rates of reported mental health problems and suicides amongst farmers. See Chuck Jones, *Amid Trump Tariffs, Farm Bankruptcies and Suicides Rise*, FORBES (Aug. 30, 2019, 11:28 AM EDT), <https://www.forbes.com/sites/chuckjones/2019/08/30/amid-trump-tariffs-farm-bankruptcies-and-suicides-rise/#1489b4cf2bc8>.

Revenue generated through Section 232 tariffs cannot justify the significant burden placed on our farmers given that the amount of duties collected by the United States is less than what has been spent in supporting struggling farmers. See Ana Swanson and

Jim Tankersley, *Tariffs on China Don't Cover the Costs of Trump's Trade War*, N.Y. TIMES (July 15, 2019),

<https://www.nytimes.com/2019/07/15/business/trade-war-tariffs-revenue.html>; *see also* Trade Statistics, CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/trade> (last updated Apr. 15, 2020) (showing that CBP has collected approximately \$9 billion in duties from 232 tariffs). There is no question that costs of retaliatory tariffs, therefore, greatly outweigh any alleged benefits from Section 232 tariffs.

Basrai Farms has itself felt the repercussions of the President's 232 tariffs. Basrai Farms' processor/handler sells its walnuts exclusively to international markets. As noted, following imposition of Section 232 duties, walnuts were targeted by China, India and Turkey for retaliatory tariffs ranging from 15 to 100 percent. As a result of disruptions to the market caused by retaliatory tariffs, Basrai Farms' anticipated price for its walnuts in 2018 decreased by approximately 48 percent from 2017. Global price declines have and will continue to cause significant economic loss. In turn, Basrai Farms anticipates a correlating profit reduction of 48 percent for 2018, leaving it with barely enough to cover farm operational expenses. An oversupply in the domestic market, correlating with walnuts being shut out of foreign markets, caused further price declines, affecting even farmers who do not export.

F. Efforts by the Executive Branch Are Not Enough to Stem the Harm Inflicted by Retaliatory Tariffs

The executive branch has attempted to ameliorate the economic harm to farmers caused by Section 232 tariffs. During 2018 and 2019, USDA announced two rounds of assistance to combat the impacts of trade retaliation. *See* CRS 2020 Ag. Issues at 16. As of February 10, 2020, USDA estimated that it has paid a combined \$20.8 billion in relief payments. *Id.*

Many trade groups have acknowledged that these federal relief packages are inadequate to cover the damage caused by retaliatory tariffs and do not address longer-term needs to expand access to export markets. For example, the Western Growers Association has stated that the first-round falls “substantially short’ of what many producers affected by the retaliatory tariffs need.” CRS Retaliatory Tariffs at 19 (internal citation omitted). The American Farm Bureau Federation similarly expressed that “{i}t is critically important to restore agricultural markets and mutually beneficial relationships with our trading partners around the world.” CRS Retaliatory Tariffs 2 at 39 (internal citation omitted).

Not only were the funds insufficient to combat the damage caused by the Section 232 tariffs themselves, but the application procedures required to obtain these funds also contained multiple flaws that prevented farmers from accessing much-needed relief. The first round of payments favored larger producers because relief was linked to crop

production. See Humeyra Pamuk, *Bulk Of Trump's U.S. Farm Aid Goes to Biggest and Wealthiest Farmers: Advocacy Group*, REUTERS (July 30, 2019), <https://www.reuters.com/article/us-usa-trade-farming/bulk-of-trumps-u-s-farm-aid-goes-to-biggest-and-wealthiest-farmers-advocacy-group-idUSKCN1UP28K> (highlighting that the “top 1% of aid recipients received an average of more than \$180,000 while the bottom 80% were paid less than \$5,000 in aid”). The second round of payments, although no longer linked to crop production, were still linked to acreage which experts argue still favors larger farms. See, e.g., Josh Zumbrun and Jesse Newman, *U.S. Farmers, Wanting a Trade Deal, Brace for Aid Package Some Fear Will Fall Short*, WALL ST. J., <https://www.wsj.com/articles/u-s-farmers-wanting-a-trade-deal-brace-for-aid-package-they-fear-will-fall-short-11558085400> (updated May 17, 2019 9:36 ET).

Banks have also noted that these relief efforts are insufficient, expressing concerns that farmers are simply too far behind on loan payments. See Alexia F. Campbell, *US Farms Are Going Bankrupt at an Alarming Rate. Trump's Trade War is Partially to Blame.*, VOX (Nov. 27, 2018, 5:30 PM EST), <https://www.vox.com/policy-and-politics/2018/11/27/18114566/trump-trade-war-china-farm-bankruptcy>. In sum, trade groups, farmers and banks are all in agreement that payments authorized by USDA cannot fully remediate the significant harm caused by retaliatory tariffs.

Recognizing the insufficiency of the first two rounds of these payments, President Trump has directed USDA to release a third tranche of relief payments under the Market Facilitation Program. *See Press Release No. 0143.20: USDA Issues Third Tranche of 2019 MFP Payments*, U.S. DEP'T OF AGRIC. (Feb. 3, 2020), *available at* <https://www.usda.gov/media/press-releases/2020/02/03/usda-issues-third-tranche-2019-mfp-payments>. As part of China's phase-one trade deal with the United States, China has agreed to buy \$200 billion in agricultural products over the next two years. *See* Edward Moreno, *U.S. Farmers Urge Lawmakers to Continue Trade Aid Until China Deal is Secure*, THE HILL (Mar. 10, 2020), 1:44 PM EDT), <https://thehill.com/homenews/administration/486836-us-farmers-urge-lawmakers-to-further-mfp-payments-until-china-deal-is>. But the current COVID-19 crisis has made the entire deal uncertain, and when combined with retaliatory tariffs, serves as a devastating one-two punch to farmers. *See id.* Financial aid payments are a mere band-aid that are insufficient to address the suffering of U.S. farmers.

In sum, retaliatory tariffs have significantly impacted the export-dependent U.S. agricultural industry. Basrai Farms in particular has suffered severe losses. Despite efforts by USDA and a movement toward reductions in these tariffs by foreign countries, it will take years for U.S. agriculture to recover from the lost shares in foreign markets that flow directly from the Section 232 tariffs.

II. The Gravity of the Harm Felt By the Agricultural Industry Supports this Court Granting Certiorari

The harm inflicted by retaliatory tariffs on the U.S. agricultural industry, as set forth above, illustrates the expansive unconstitutional authority granted to the President under Section 232.

Judge Katzmann’s dubitante opinion at the lower court noted that “the fullness of time can inform understanding that may not have been available more than forty years ago. We deal now with real recent actions, not hypothetical ones. Certainly, those actions might provide an empirical basis to revisit assumptions.” *AIIS*, 376 F. Supp. 3d at 1352. Indeed, the Federal Circuit similarly stated that “five members of the {Supreme} Court have recently expressed interest in at least exploring a reconsideration of {the delegation-doctrine} standard.” *AIIS*, 2020 U.S. App. LEXIS 6106, at *17.

As the present action indicates, the time to revisit those assumptions is now. *See* Pet. for Cert. at 20 (“{T}his challenge to section 232 present{s} an excellent opportunity to answer the question of whether the delegation doctrine retains any vitality.”). Although Congress must have flexibility to delegate some of its authority, to balance separation of powers concerns, the Constitution only allows for delegation where Congress has set forth “an *intelligible principle* to which the person or body authorized to {act} . . . is directed to conform.” *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis added). Whether a statute sets forth an intelligible principle depends on the facts of

the case, but generally Congress must set forth some set of “criterion to govern the President’s course.” *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935).

Section 232 tariffs are designed to target imports of steel and aluminum, but the President’s actions have provoked retaliatory tariffs against U.S. exports, extending the effects of the President’s actions to the entire economy regardless of any impact on “national security.” See 19 U.S.C. § 1862(c)-(d). The statute grants the President the authority to favor certain industries, in this case steel and aluminum, to the detriment of all others without providing any guidance on how the President is to weigh these trade-offs. See Pet. for Cert. at 33 (explaining that retaliation is one of the factors that Congress left “entirely up to the President to decide what to do . . . and how to balance among {these factors}”). By failing to require that the President assess the likelihood of collateral damage caused by retaliatory measures imposed on U.S. exports, especially agricultural products, Section 232 fails to set forth an intelligible principle to “govern the President’s course.” See *Panama*, 293 U.S. at 415.

Respondents have been unable to identify a single action under the statute that would be beyond the President’s power. See *id.* at 26. The impact of these Section 232 tariffs on the entire economy illustrates why Respondents have been unable to identify such an instance and the answer is simple - such a limit on the President’s authority under Section 232 does not exist. Wars, revolts and decapitations in England were keenly on the minds of the Founding Fathers when they put in place a

separation of powers to retain and protect the power to tax within the legislative branch. Congress neglected that history by over-delegating taxing authority to the President. For the American farmers of today and the future, this Court should send a strong message to Congress reaffirming the wisdom of the Founding Fathers by striking down Section 232 as unconstitutional.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the case set down for prompt briefing and argument.

Respectfully submitted,

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